Filed 3/29/19 D.R. Horton L.A. Holding Co., Inc. v. Milgard Manufacturing, Inc. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

D.R. HORTON LOS ANGELES HOLDING COMPANY, INC., Cross-complainant and Respondent, v. MILGARD MANUFACTURING, INC., Cross-defendant and Appellant.	D074889 (Super. Ct. No. RIC1112846)

APPEAL from a judgment of the Superior Court of Riverside County, Sharon J. Waters, Judge. Affirmed.

Diem Law and Robin L. Diem; Hammons & Baldino and Ryan Walter Baldino for Cross-defendant and Appellant.

Plante Lebovic and Brian Christopher Plante, Ira D. Lebovic, Gregory Martin Golino for Cross-complainant and Respondent.

Cross-defendant and appellant Milgard Manufacturing, Inc. (Milgard) appeals from a judgment finding that D.R. Horton Los Angeles Holding Company, Inc. (D.R. Horton) was the prevailing party in D.R. Horton's cross-complaint for indemnity, breach of contract and declaratory relief against Milgard. In that cross-complaint, D.R. Horton sought to recover an unspecified amount of investigation expenses as well as litigation fees and costs, alleging Milgard failed to meet its duty to defend and indemnify D.R. Horton against claims in an underlying construction defect action. After a contested bench trial on the matter, the trial court found Milgard responsible for 5 percent of D.R. Horton's fees and costs, awarding D.R. Horton $11,100 and declaring it the prevailing party under Civil Code[1] section 1717, subdivision (b)(1). It ruled Milgard was not a prevailing party within the meaning of section 1717, subdivision (b)(2) (hereafter section 1717(b)(2)), because Milgard did not allege that statute as an affirmative defense in its initial answer to the cross-complaint or actually tender the amount to D.R. Horton before depositing it in court.

Milgard contends the trial court erred by this ruling. It argues: (1) section 1717(b)(2) does not require the defense be alleged in the original answer, and its plain language, as well as its legislative history,[2] demonstrate that the defense can be raised in

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1 Statutory references are to the Civil Code.

2 Milgard has asked that we take judicial notice of the legislative history of section 1717 and various pleadings involving Milgard and D.R. Horton in unrelated litigation. D.R. Horton does not oppose Milgard's request with regard to the legislative history, but has sought to supplement that history via its own request for judicial notice. It objects to judicial notice of the superior court pleadings as not before the trial court, irrelevant, and

an amended answer; (2) the statute does not require a tender be made before the money is deposited with the court; (3) case law supports a finding that Milgard complied with section 1717(b)(2); and (4) public policy supports the conclusion that Milgard complied with the statute and should be deemed the prevailing party.

The well-established legal definitions of a tender and a plea of tender, supported by judicial decisions construing identical tender and deposit language in other statutes as well as the legislative purpose of section 1717(b)(2), dictate a result in favor of D.R. Horton. Under these principles, it is not the timing of the *plea* that is dispositive, but the nature and timing of the *tender*. Milgard's purported tender was invalid; it was neither timely nor unconditional, and Milgard could not have made a proper tender within the meaning of the statute because D.R. Horton's damages were unliquidated and subject to court determination. Because the trial court correctly concluded that Milgard was not the prevailing party under section 1717(b)(2), we affirm the judgment.

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lacking evidence the cross-complainants are its "affiliates." We grant the parties' unopposed requests to take judicial notice of legislative history materials for section 1717. (Evid. Code, § 452, subd. (c); *People v. Wright* (2019) 31 Cal.App.5th 749, 839, fn. 2; see *S.Y. v. Superior Court of San Diego County* (2018) 29 Cal.App.5th 324, 342; *Jabo v. YMCA of San Diego County* (2018) 27 Cal.App.5th 853, 872.) As for the superior court pleadings, Milgard argues they are "relevant to this appeal because they are evidence of a pattern and practice of [D.R. Horton] and its affiliates to engage in the exact type of litigation tactics that section 1717(b)(2) was enacted to curb." Though we have the ability to take judicial notice of those matters (*Brosterhouse v. State Bar* (1995) 12 Cal.4th 315, 325-326 ["While the reviewing court may take judicial notice of matters not before the trial court, it need not do so"]), we decline to do so because our conclusion turns on the language and purpose of section 1717(b)(2), and the unrelated pleadings are not relevant to resolution of the matter.

FACTUAL AND PROCEDURAL BACKGROUND

We take the factual background in part from the parties' stipulation of facts for purposes of trial on D.R. Horton's claim for defense fees and costs. Other facts are stated in the light most favorable to D.R. Horton. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 787.)

In 2011, plaintiff homeowners of 52 single family homes in three Riverside County communities filed a construction defect action against D.R. Horton, the developer and general contractor for the projects. D.R. Horton had subcontracted with Milgard to supply windows and to supply and install sliding glass doors. Plaintiffs' first amended complaint alleged defects in 57 homes. Plaintiffs thereafter agreed to stay the litigation to commence construction defect pre-litigation notice procedures, and during that process increased the number of homes at issue to 75.

In late 2011, D.R. Horton tendered its defense to Milgard under their subcontracts, which required Milgard to defend and indemnify D.R. Horton from claims arising out of or relating to Milgard's scope of work. Milgard did not accept the tender or offer to defend D.R. Horton. D.R. Horton performed repairs to 37 homes in 2012, and observed destructive testing at 27 of the homes in 2013 and 2014.

In December 2012, D.R. Horton filed a cross-complaint against Milgard for indemnity and breach of contract for Milgard's failure to defend it in the underlying action. Among other relief, it sought an unspecified amount of damages as well as a judicial determination that Milgard "reimburse [it] for all fees and costs incurred in defending against Plaintiffs' claims, including, but not limited to, investigation expenses,

attorneys' fees, and costs." Thereafter, the plaintiffs filed a second amended complaint reducing the number of homes at issue to 40. They later added Milgard as a defendant. In March 2013, Milgard answered D.R. Horton's cross-complaint, denying generally and specifically its allegations.

In 2014, Milgard settled claims with 26 plaintiffs for $2,700. D.R. Horton settled the remaining claims in January 2015 for $132,600. At some point, the matter was set for trial on D.R. Horton's cross-complaint.

In April 2015, Milgard filed a Code of Civil Procedure section 998 offer to compromise the matter for $75,000, which D.R. Horton did not accept.[3]

About one month before trial, Milgard applied ex parte to file a first amended answer in which it sought to assert an affirmative defense under section 1717(b)(2) based on *Karton v. Dougherty* (2014) 231 Cal.App.4th 600 (*Karton*). Milgard asserted that it was not until it received D.R. Horton's trial brief that it could evaluate D.R. Horton's claim for defense fees and costs. On June 5, 2015, the trial court granted Milgard's application and deemed filed an amended answer. The amended answer's forty-first affirmative defense alleged that Milgard "has tendered to [D.R. Horton] the full amount to which [D.R. Horton] is entitled for cost of defense and indemnity and has deposited said funds with the Court pursuant to Civil Code [section] 1717(b)(2). Based on the foregoing, [Milgard] alleges that [D.R. Horton] is not entitled to recovery under contract

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[3] Milgard states in its opening brief that the trial court has yet to decide the enforceability of that offer.

and that [Milgard] must be deemed prevailing party for purposes of recovery of attorney fees as a matter of law." (Some italics omitted.)

On June 23, 2015, Milgard filed a "Notice of Deposit of Contract Damage Funds Pursuant to Civil Code [section] 1717(b)(2)" stating that Milgard "by and through its counsel for [*sic*] record . . . hereby deposits, pursuant to [section] 1717(b)(2), the sum of forty-five thousand dollars ($45,000). [¶] This sum is in excess of the amount Milgard in good faith believes is owed pursuant to all claims alleged Cross-Complaint of D.R. Horton, Inc. . . . However, notwithstanding the foregoing, Milgard makes no claim on the foregoing amounts and consents to their release to D.R. Horton at the conclusion of this matter."

The parties tried D.R. Horton's cross-complaint to the court on the pleadings, a joint stipulation of facts, and declarations. The main trial issue, which was highly contested, was how much of D.R. Horton's defense attorney fees and costs were attributable to Milgard's scope of work, including whether Milgard would be responsible for "building envelope" or flashing defects. D.R. Horton initially sought $89,331.74 in defense fees and costs that it claimed were attributable to Milgard, which included $51,581.91 in fees and costs pursuing its cross-complaint. In a supplemental trial brief, it raised its demand to $98,305.34. Milgard argued its defense obligation was only 4 percent of the money D.R. Horton paid in defending the plaintiffs' construction defect claims, which Milgard stated was $164,467.67 based on attorney invoices, and thus the sum properly allocated to it was $6,445.83.

The trial court found that D.R. Horton had properly tendered its defense to Milgard and Milgard had a contractual duty to defend D.R. Horton, which had submitted sufficient evidence to establish its payment of defense fees and costs and had not failed to mitigate its damages. It ruled Milgard was responsible for 5 percent of D.R. Horton's fees and costs incurred from November 2011 to November 2014, and left it to the parties to figure the dollar amount. D.R. Horton and Milgard thereafter agreed that 5 percent of the fees and costs equaled $11,100.

The parties filed cross-motions to be deemed the prevailing party for purposes of an award of attorney fees and costs in the breach of contract cross-complaint. D.R. Horton argued it was the prevailing party under section 1717 since it had obtained a simple, unqualified win on its contract claim and was in the superior equitable position, as Milgard had failed to comply with its contractual obligations and recovered nothing. D.R. Horton maintained Milgard's deposit of money with the court did not qualify it for prevailing party status because (1) the deposit was insufficient in that D.R. Horton was owed at least $62,681, which included its attorney fees and costs through January 2015; (2) Milgard's defense obligation was not a liquidated sum and subject to a court determination, unlike the damages in *Karton*, *supra*, 231 Cal.App.4th 600; and (3) Milgard did not deposit funds contemporaneously with its original 2012 answer, which according to D.R. Horton was a condition precedent for invoking section 1717(b)(2). D.R. Horton argued to hold otherwise would be contrary to the "letter and spirit" of the statute, and allow "a party who willfully breached a contract [to] force the damaged party into unnecessary and protracted litigation, deposit the money owed at or near the end of

the case, and then recover all of its costs in the litigation, notwithstanding it was who necessitated the litigation in the first place," forcing the aggrieved party to pay its costs. D.R. Horton further argued that even if the statute were interpreted otherwise, the amount Milgard deposited was insufficient to compensate it for its defense fees and what it was due as the prevailing party, as it expended an additional $51,581 to prosecute the cross-complaint.

In response, Milgard argued it was the prevailing party under *Karton*, pointing out its deposit was in excess of the $11,100 in contract damages the court awarded to D.R. Horton after trial. It argued the law did not require it to deposit prevailing party attorney fees under section 1717(b)(2), nor did the statute require the filing of funds contemporaneously with the filing of the original answer. Milgard further argued it achieved its main litigation objective to obtain a ruling that its defense obligation was limited to claims arising from its scope of work, and its recovery was far less than the over $98,000 sought by D.R. Horton.

In considering the question, the trial court rhetorically asked Milgard why it waited four years to deposit any amount with the court, stating: "I know why you needed to wait four years, because you didn't have a clue as to what the fees would be. You have it multiple ways, one because the fees were ongoing and still being incurred. And two, you didn't know how much would be allocated one way or the other. [¶] . . . [¶] . . . That's what makes this whole process seem so incredibly inappropriate under the statute. It does nothing to avoid pointless litigation. It does nothing to encourage settlement. You're trying to treat [Civil Code section] 1717 like [Code of Civil Procedure section]

998. It's not a 998 statute. I can't allocate. I don't even know if you're arguing that I've lost my ability to say neither party is the prevailing party."

The court denied Milgard's motion and granted D.R. Horton's motion, ruling Milgard was not the prevailing party within the meaning of section 1717(b)(2). It stated its view that the Legislature did not envision using the statute in the manner Milgard had; that the primary purpose of the statute was to prevent pointless litigation, which did not occur: "As I said, the number you picked was arbitrary. The number they picked was arbitrary. It didn't prevent four years of litigation. . . . I see nothing that fits in terms of the spirit of what the second paragraph [of section 1717(b)(2)] and the third was intended to apply to." It further ruled that the literal language of the statute referred to a tender at the time of the original answer: "I'm stuck with the fact that it doesn't say amended answer. It says when you file your answer. It doesn't say because you gave notice you were depositing that you didn't have to first tender it to D.R. Horton. So if I go to the literal language of the statute, you don't comply with it." The court pointed out that the tender and deposit were distinct acts, "[o]ne of which is basically suggesting before you file your answer and plead this, you've made an attempt to avoid the litigation by tendering the amount." The court made what it characterized as two "factual" findings to deny Milgard prevailing party status: that Milgard did not assert the statute as an affirmative defense in its original pleading, and did not tender the amount to D.R. Horton before depositing it with the court. It ultimately entered judgment in favor of D.R. Horton for $11,100 in defense fees and costs, and deemed D.R. Horton the prevailing party.

Milgard filed this appeal from the ensuing judgment.

DISCUSSION

Milgard and D.R. Horton both contend the plain language of section 1717 subdivision (b)(2), as well as *Karton*, *supra*, 231 Cal.App.4th 600, supports their respective interpretations of a valid "tender and deposit" defense. Milgard contends the statute's silence on whether the defense must be asserted in an "amended" or "original" answer establishes that a defendant's affirmative defense as to tender and deposit may be raised in an amended answer, and that the legislative history and purpose behind section 1717(b)(2) to encourage settlements supports its position. Milgard maintains the statute contains no requirement that a tender be made before a deposit, as the trial court ruled. According to Milgard, its notice of deposit and deposit constituted a tender, which D.R. Horton merely needed to accept to end the action. Milgard argues that "without the protection of 'cost-shifting' provisions such as section 1717(b)(2), subcontractors—like Milgard here—are vulnerable to being effectively blackmailed into paying excessive settlement demands just to avoid potentially even higher prevailing party fees after trial," and the overriding policy of the statute to encourage settlements should compel a finding that it was the prevailing party under its terms.

D.R. Horton contends section 1717(b)(2)'s plain language, including its use of past and present tenses, requires a tender of the full amount owed to the plaintiff under the contract, a rejection of the tender, and then a subsequent deposit. It maintains the language—"[the defendant must] allege in his or her answer that he or she tendered"—requires a pre-litigation or pre-answer tender; that the Legislature did not intend for a

defendant to wait until litigation commenced, then deposit funds with the court without first offering them to the plaintiff. D.R. Horton points out case law interpreting nearly identical language is consistent with its interpretation. It asserts Milgard's argument violates the legislative intent and purpose of the statute and would lead to absurd results, creating a windfall for defendants who contest liability and force the parties to incur substantial fees and costs, then later tender only the principal amount, leaving a plaintiff to pay its own, as well as the defendant's, attorney fees and costs.

I. *Standard of Review and Principles of Statutory Construction*

Broadly, this court reviews for abuse of discretion a trial court's decision designating the prevailing party for purposes of awarding attorney fees and costs. (*DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 973; *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.)

This appeal, however, presents the question of whether the court correctly interpreted section 1717(b)(2) in determining Milgard was not the prevailing party under its terms. The matter involves a question of statutory interpretation that this court reviews de novo. (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 633; *Goodman v. Lozano*, *supra*, 47 Cal.4th at p. 1332.) " 'Our fundamental task is to determine the Legislature's intent and give effect to the law's purpose. [Citation.] We begin by examining the statute's words " 'because they generally provide the most reliable indicator of legislative intent.' [Citation.] If the statutory language is clear and unambiguous our inquiry ends." ' [Citation.] In that case, the plain meaning of the

statute is controlling, and ' "resort to extrinsic sources to determine the Legislature's intent is unnecessary." ' " (*Lopez*, at pp. 633-634.)

It is well-established that "when a word or phrase appearing in a statute 'has a well-established *legal* meaning, it will be given that meaning in construing the statute.' This has long been the law of California . . . ." (*Brown v. Superior Court* (2016) 63 Cal.4th 335, 351; *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19; accord, § 13 [words and phrases are to be construed according to "approved usage," but "such others as may have acquired a peculiar and appropriate meaning in law . . . are to be construed according to such peculiar and appropriate meaning"].) "This rule applies most obviously when the meaning of the word in question is wholly or primarily legal." (*Arnett*, at p. 19.) Further, "[w]e generally presume the Legislature is aware of appellate court decisions [citation] and do not presume that the Legislature, in the enactment of statutes, intends to overthrow long-established principles of law unless such an intention is made clear by declaration or necessary implication." (*Gaetani v. Goss-Golden West Sheet Metal Profit Sharing Plan* (2000) 84 Cal.App.4th 1118, 1127; see *Estate of McDill* (1975) 14 Cal.3d 831, 837-838 [" 'The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended' "].)

"[I]f the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. [Citation.] In the end, we ' "must select the construction that comports most

closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.)

II. *"Tender and Deposit" Provision of Section 1717*(*b*)(*2*)

Section 1717 provides in part:

"(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

[¶] . . . [¶]

"(b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

"(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

"Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court

for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section.

"Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall be allocated to the parties in the same proportion as the original funds are allocated."

The Legislature added subdivision (b)(2) to section 1717 in 1981 by Senate Bill No. 1028. (Enrolled Bill Report, Department of Legal Affairs, dated September 23, 1981.) The amendment inserted language virtually identical to the tender and deposit provisions contained in section 1811.1 of the Unruh Act and other statutes. (See Senate Republican Caucus Digest re: Senate Bill 1028, original version, p. 2.)[4] By expressly

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4 A Senate caucus digest states: "Proponents perceive another deficiency in present [section] 1717 in that it does not contain a provision allowing the defendant to be deemed the prevailing party when she or he tenders the plaintiff the full amount to which the defendant alleges that the plaintiff is entitled, deposits that amount in court, and then establishes the allegation as true. Such a provision, which is aimed at encouraging settlements, is contained in present [section] 1811.1, whose language [Senate Bill No.] 1028 would incorporate into [section] 1717." (Senate Republican Caucus Digest re: Senate Bill No. 1028, original version, p. 2; see also Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1028 (1981-1982 Reg. Sess.), as introduced, p. 3; *New Cingular Wireless PCS, LLC v. Public Utilities Com.* (2016) 246 Cal.App.4th 784, 802, fn. 15 ["in relying on legislative history 'courts may properly consider committee reports [citation], partisan caucus analyses [citation], and the digest of the Legislative Counsel [citation]' "].) Section 1811.1 provides: "Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract or installment account subject to the provisions of this chapter regardless of whether such action is instituted by the seller, holder or buyer. Where the defendant alleges in his answer that he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the

incorporating this language, the "Legislature *expand*[*ed*] the class of defendants who could be found to be 'prevailing parties' for purposes of section 1717 . . . ." (*Damian v. Tamondong* (1998) 65 Cal.App.4th 1115, 1123.)

Section 1717 does not define the term "tender" or specify when the tender (as opposed to the defendant's plea of tender) is to take place. A tender is a legal term of art however, and " '[w]hen the Legislature uses a term of art, a court construing that use must assume that the Legislature was aware of the ramifications of its choice of language.' " (*Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 850, fn. 3, quoting *Creutz v. Superior Court* (1996) 49 Cal.App.4th 822, 829.) As stated, unless a contrary intention is "clearly indicated by the statute," courts presume the Legislature intended legal terms of art to convey "their established legal or technical meanings." (*Texas Commerce Bank v. Garamendi* (1992) 11 Cal.App.4th 460, 475; see *County of Santa Clara v. Escobar* (2016) 244 Cal.App.4th 555, 564.)

A tender is a particular legal term for a species of an offer. (See *Walker v. Houston* (1932) 215 Cal. 742, 745-746; *Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 385.) It is "an offer of performance made with the intent to extinguish the obligation" that, "[w]hen properly made, . . . has the effect of putting the other party in default if he refuses to accept it." (*Still*, at p. 385; see also *Crossroads Investors, L.P. v. Federal National Mortgage Assn.* (2017) 13 Cal.App.5th 757, 783;

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plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a prevailing party within the meaning of this article." The sole difference between the clause at issue and section 1811.1 is a comma, use of male pronouns, and the word "article" rather than "section."

Black's Law Dict. (5th ed. 1979) p. 1315 [defining a tender as "[t]he act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim or demand, without any stipulation or condition"].) At common law, it existed principally as a means of limiting damages or costs. (*Chen v. Allstate Ins. Co.* (9th Cir. 2016) 819 F.3d 1136, 1146, fn. 7; see *Walsh v. Walsh* (1940) 42 Cal.App.2d 293, 295 [plaintiff held not entitled to recover attorney fees after refusing to accept defendant's valid tender].)

"[A] tender to be valid must be of full performance [citation], and it must be unconditional." (*Still v. Plaza Marina Commercial Corp.*, *supra*, 21 Cal.App.3d at p. 385; *Crossroads Investors, L.P. v. Federal National Mortgage Assn.*, *supra*, at p. 783; *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 580; *Wiener v. Van Winkle* (1969) 273 Cal.App.2d 774, 782 ["It is well established that a tender must be unconditional, and an unwarranted condition annexed to an offer to pay is in effect a refusal to perform"]; see § 1494 ["An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform"].) Additionally, " ' "where the rules [concerning tender] are prescribed by statute . . . , the tender must be in such form as to comply therewith. The tenderer must do and offer everything that is necessary on his part to complete the transaction, and must fairly make known his purpose without ambiguity, and the act of tender must be such that it needs only acceptance by the one to whom it is made to complete the transaction." ' " (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439.) "[I]t is a debtor's responsibility to make an

unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no effect." (*Id*. at p. 439.)

Thus, a defendant's purported tender, filed simultaneously with a counterclaim, was held insufficient where the defendant stated it was "willing to pay [plaintiffs] the amount of our tender" and "if it turns out, after a trial, that we were entitled to a set off, we will seek from their assets to get it back." (*Still v. Plaza Marina Commercial Corp.*, *supra*, 21 Cal.App.3d at p. 385.) The defendant's offer was "qualified and conditional by reason of the counterclaim." (*Ibid*.) Similarly, a tender was held invalid where a defendant deposited funds in an escrow account "pending entry of a final District Court order or judgment directing the escrow agent to pay the tendered funds to [plaintiff] . . . and dismissing this action as moot." (See *Chen v. Allstate Ins. Co.*, *supra*, 819 F.3d at p. 1146.) Under the circumstances, the plaintiff did not "actually or constructively receive[] the [funds]" so as to invoke the common law doctrine of tender. (*Ibid*.)

Section 1717(b)(2) requires not just a tender, but that the defendant allege in its answer that it "tendered to the plaintiff the full amount to which [the plaintiff] was entitled . . . ." Such a plea also has a legal meaning and sheds light on when a tender must be made. A "[t]ender, in common law pleading, is a plea by defendant that he has been always ready to pay the debt demanded, *and before the commencement of the action tendered it to the plaintiff*, and now brings it into court ready to be paid to him, etc." (Black's Law Dict., *supra*, pp. 1315-1316, italics added; see *Campbell-Ewold Co. v. Gomez* (2016) ___ U.S. ___ [136 S.Ct. 663, 675] (conc. opn. of Thomas, J.) [describing a common law tender as "an offer to pay the entire claim *before a suit was filed*,

accompanied by 'actually produc[ing]' the sum 'at the time of tender' in an 'unconditional' manner," italics added]; *Joseph Magnin Company v. Schmidt* (*Schmidt*) (1978) 89 Cal.App.3d Supp. 7 ["[t]ender is a word in common legal usage to denote an offer *before suit*" and such tenders "*are to be made before the litigation commences*," italics added]; accord, *Walsh v. Walsh*, *supra*, 42 Cal.App.2d at p. 295 ["defendant made a valid tender to plaintiff prior to the institution of the present action of the amounts for which the trial court gave her judgment" but plaintiff refused to accept the tender; court held the judgment "should not have included an allowance to her for attorney's fees"]; *Bogue v. Roeth* (1929) 98 Cal.App. 257, 262, 266 [plaintiff cattle owner before filing suit had tendered the amount due the defendants under a pasturage contract and pleaded such tender in his complaint, held to be "the adequate pleading thereof"].)

Use of this device to relieve defendant of the burden of paying a plaintiff's fees and costs is not new to section 1717(b)(2); as stated, the Legislature expressly inserted without substantial alteration the language from the Unruh Act and other consumer protection laws. (§ 1811.1 [Unruh Act]; see *Tun v. Wells Fargo Dealer Services, Inc.* (2016) 5 Cal.App.5th 309, 326-326 [same "tender and deposit" language appears in section 2983.4 of the Automobile Sales Finance Act and section 2988.9 of the Vehicle Leasing Act].)[5] Where the Legislature takes provisions from other statutes as here, it is

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5 Section 2988.9 provides: "Reasonable attorney's fees and costs shall be awarded to the prevailing party in any action on a lease contract subject to the provisions of this chapter regardless of whether the action is instituted by the lessor, assignee, or lessee. Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court, for the

presumed to know the judicial interpretation given to the other statute's provisions. (See, *Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 378 [giving identical phrases "on a contract" in sections 1811.1 and 2983.4 the same meaning]; *People v. Jones* (2001) 25 Cal.4th 98, 109, superseded by statute on other grounds as stated in *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1307; see also *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 478 [when the Legislature uses the same language in a related statute, reviewing court presumes the Legislature intended the language to have the same meaning].)

Contrary to Milgard's assertion that section 1811.1 has "nothing to do with the Legislative History or purpose of section 1717(b)(2)," the meaning of the tender and deposit provision in section 1717 is guided by decisions interpreting the same language in other statutes with similar language, and we give the provisions the same meaning. One such decision is that of the appellate division in *Schmidt*, *supra*, 89 Cal.App.3d Supp. 7, which predated the Legislature's 1981 addition of subdivision (b)(2) in section 1717. At issue in *Schmidt* was which party prevailed under section 1811.1 in an action (for account stated, open book account and common count) on a retail installment contract subject to the Unruh Act. (*Id*. at pp. Supp. 8-9.) The defendant contended her payment of the principal amount of the debt after the complaint was filed but before filing her answer was a tender within the meaning of the statute, making her the prevailing party entitled to

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plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be the prevailing party within the meaning of this section." Section 2983.4 provides that "[r]easonable attorney fees and costs shall be awarded to the prevailing party in any action on a contract or purchase order subject to the provisions of this chapter regardless of whether the action is instituted by the seller, holder or buyer" and contains the same tender and deposit language as section 2988.9.

an award of her reasonable attorney fees and costs. (*Id*. at p. Supp. 9.) As an issue of first impression, *Schmidt* squarely addressed "whether the tender [of section 1811.1] should occur before or after suit, irrespective of any question regarding any deposit." (*Id*. at pp. Supp. 10, 12.) The court held the defendant's tender was invalid because it was not made before the lawsuit was filed: "The clear import of section 1811.1 is to encourage prelitigation tenders. Tender is a word in common legal usage to denote an offer before suit. The use of the word 'tender' in the same sentence in which the phrase '. . . deposits in court . . . ' appears also supports our conclusion that tenders in section 1811.1 are to be made before the litigation commences. Logically then if the prelitigation tender is refused the defendant may after suit allege such tender and deposit the amount to which plaintiff is entitled into court." (*Id*. at p. Supp. 11.)

Schmidt also addressed the defendant's arguments concerning ambiguity and uncertainty in section 1811.1's requirement that the tender and deposit be the " 'full amount to which he (plaintiff) was entitled . . . .' " (*Schmidt, supra*, 89 Cal.App.3d at p. Supp. 11.) According to the defendant, the requirement led to absurd results because the amounts attributed to attorney fees, costs and interest were not ascertained until the end of the litigation. (*Ibid*.) *Schmidt* acknowledged that even the principal amount of a debt was itself sometimes uncertain until the litigation is concluded, and stated: "A defendant seeking the benefits of this statute may deposit in court any amount he believes is legitimately due to the plaintiff and allege by answer a *previous tender* to plaintiff of the amount deemed to be due and plaintiff's refusal thereof. Defendant may *then* deposit such sums as attorney fees and costs as are set forth in the complaint or may be

ascertained to have been incurred through direct inquiry of plaintiff. . . . [W]e find that any such alleged uncertainty does not justify penalizing a plaintiff, such as plaintiff in this case, to whom a tender was not made prior to the commencement of an action." (*Schmidt, supra,* 89 Cal.App.3d at p. Supp. 12, italics added; see also *Tun v. Wells Fargo Dealer Services, Inc., supra,* 5 Cal.App.5th 309, 327 ["a tender under [section 2983.4] is an estimate of the 'full amount' of what a tendering defendant believes a plaintiff *may* be 'entitled' to in any 'action on a contract or purchase order' subject to the [Automobile Sales Finance Act], which, *if* later 'found to be true by the court [or trier of fact]' [citation], will make that tendering defendant the prevailing party, despite the plaintiff's recovery of the amount tendered (or any *lesser* amount) against that defendant].) Having in mind the common legal understanding of a tender, the *Schmidt* court did not envision a circumstance where the defendant's tender and its plea (or even the deposit) were simultaneous.

The court concluded: "[N]either law, equity, fairness nor justice requires that a defendant debtor be entitled to delay payment of a debt in circumstances such as these until after a lawsuit has been filed and thus defeat a plaintiff-creditor's entitlement to attorneys fees and costs. What [defendant] seeks here is not merely a liberal interpretation of section 1811.1 but an emasculation of its purpose to reward defendants with good defenses who risk sums for attorneys fees and advance costs in behalf of those good defenses. [Defendant] did not fall within the class of persons with a good defense. She failed to follow the procedural steps properly to assert such a defense if she had one

which would have entitled her to attorneys fees and costs if she had prevailed." (*Schmidt*, *supra*, 89 Cal.App.3d at p. Supp. 13.)

When the Legislature incorporated the language interpreted by *Schmidt* into section 1717(b)(2), it did not express any contrary intent to suggest a different meaning of, or timing requirements for, the referenced tender. Courts presume the Legislature " 'enacted and amended statutes " ' "in the light of such decisions as have a direct bearing upon them . . . ." ' " ' " (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 236-237; *People v. Castillolopez* (2016) 63 Cal.4th 322, 331; see also *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609 ["The Legislature is deemed to be aware of existing laws and judicial decisions construing the same statute in effect at the time legislation is enacted"].) "It is an established judicial principle that 'when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment.' " (*Avidor v. Sutter's Place, Inc.* (2013) 212 Cal.App.4th 1439, 1450, quoting *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 and citing *In re Estate of Heath* (2008) 166 Cal.App.4th 396, 402, 82 Cal.Rptr.3d 436 ["[w]hen a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it"].)

Schmidt's holding, dealing with a virtually identical tender and deposit provision as that contained in section 1717(b)(2), has a direct bearing on the nature and timing of a

valid tender. We presume the Legislature intended to refer to such a plea when it incorporated the tender and deposit language of section 1811.1 into section 1717.[6] Under the foregoing principles, the prevailing party determination under section 1717(b)(2) does not turn on whether a defendant alleged the requisite tender in an amended answer or its original answer. It is not the timing of the *plea* but the nature and timing of the *tender* that matters; as long as the defendant pleads a proper, pre-litigation, tender, the allegation may be made in the original or an amended pleading. Because the

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6 In *Tun v. Wells Fargo Dealer Services, Inc.*, *supra*, 5 Cal.App.5th 309, this court cited *Schmidt* with approval in deciding that a tender within the meaning of section 2983.4 did not constitute a judicial admission of liability. (*Tun*, at p. 327.) *Tun* also relied on *Hart v. Autowest Dodge* (2007) 147 Cal.App.4th 1258, which held that where a defendant is found not liable in an action under the Vehicle Leasing Act (§ 2985.7), it is the prevailing party irrespective of the tender and deposit language of the statute: "The second sentence of [section 2988.9] does not require tender and deposit as prerequisites for an attorney's fees award in addition to the 'prevailing party' requirement of the statute's first sentence. Rather, the second sentence of the statute merely describes one way in which a defendant will be declared a 'prevailing party,' i.e., where a defendant who concedes owing money but disputes the amount, tenders and deposits the amount to which the plaintiff is entitled, and the allegation (that this is the full amount to which the plaintiff is entitled) is found to be true by the court. It would be nonsensical to require a defendant who has done nothing wrong to tender, deposit, and prove an amount to which plaintiff is 'entitled' in order to recover attorney fees." (*Hart*, at p. 1262.) Both *Tun* and *Hart* acknowledged *Schmidt*'s holding that a tender must be made before litigation commences. (*Tun*, at p. 327; *Hart*, at pp. 1262-1263.) *Hart* observed that "the purpose of the statutory language is clear; it prevents a defendant (who admittedly owes money) from making the plaintiff spend money on attorney's fees before getting paid, yet it allows the defendant who tries to do the right thing to recover attorney's fees if the plaintiff refuses the money and the defendant meets the statutory requirements of tender and deposit." (*Id*. at p. 1263.) *Hart* expressly declined to address whether a tender must be alleged in an original answer or whether the trial court was required to make an express finding as to whether the defendant tendered the entire amount to which the plaintiff was entitled. (*Id*. at p. 1264.) Neither case sheds light on the question of whether Milgard's tender complied with 1717(b)(2).

Legislature was aware of *Schmidt*'s judicial construction of that language, it did not need to further specify procedures for a tender or the timing of a plea within the meaning of the statute.

III. *Milgard's Purported Tender was Invalid*

A. *Milgard's Purported Tender was Not Timely or Unconditional*

Under the foregoing principles, and strictly applying the rules governing tender as we must (*Nguyen v. Calhoun*, *supra*, 105 Cal.App.4th at p. 439), we conclude Milgard cannot plead and prove a proper tender, as its purported June 2015 tender was both untimely and conditional.

On appeal, Milgard makes clear that its notice of deposit and deposit constituted its tender. Milgard's notice, however—filed nearly two-years after D.R. Horton brought its cross-complaint—stated that Milgard agreed to the release of its funds, but only *at the end of the lawsuit*: it provides Milgard "hereby deposits . . . the sum of forty-five thousand dollars ($45,000)" and "consents to their release to D.R. Horton *at the conclusion of this matter*." As in *Schmidt*, equity and fairness do not permit Milgard to delay payment of its debt until after litigation and in that way defeat D.R. Horton's entitlement to attorney fees and costs. (*Schmidt*, *supra*, 89 Cal.App.3d at p. Supp. 13.) Further, though it deposited the funds in court, Milgard did not in June 2015 unconditionally relinquish its interest in them.[7] Milgard's own argument emphasizes the

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[7] Section 1717(b)(2) instructs that a defendant who alleges tender must "thereupon deposit[] in court for the plaintiff, the amount so tendered . . . ." Because we conclude

contingent nature of its tender; in its opening brief, it says "following Milgard's tender and deposit of the $45,000, all that D.R. Horton needed to do to put an end to the case and avoid trial was to notify Milgard and the court that it accepted Milgard's tender *and request the court dismiss its cross-complaint in exchange for a release of the funds*." (Some emphasis omitted, some italics added.) We see no difference between Milgard's proposal and the invalid conditional offers made in *Still v. Plaza Marina Commercial Corp.*, *supra*, 21 Cal.App.3d 378 and *Chen v. Allstate Ins. Co.*, *supra*, 819 F.3d 1136.

Milgard maintains that *Karton*, *supra*, 231 Cal.App.4th 600 requires a different result; that *Karton* establishes that a section 1717(b)(2) tender may be made even after litigation commences. *Karton* did not involve tender and deposit; the defendant, the former client of the plaintiff attorney, alleged in an answer that he had fully paid, and the plaintiff had *actually collected*, the entire debt at issue. (*Karton*, at p. 604.) An arbitration panel found that allegation to be true. (*Karton*, at p. 605.) On a trial de novo of the plaintiff's claims for breach of contract, indebtedness assumpsit, account stated and other claims, the trial court found the plaintiff had already collected funds sufficient to cover all principal and interest payments due on the invoices, and that the debt had been extinguished. (*Id*. at p. 606.) Nevertheless the court found the plaintiff had established a breach of contract, and awarded him contractual attorney fees and costs. (*Id*. at pp. 606-607.) The Court of Appeal reversed, holding the defendant client was the prevailing party under section 1717, because the plaintiff recovered no " 'relief in the action on the

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Milgard's tender was not timely, we do not decide whether this clause means the deposit must be made at the time of tender or at the time the defendant *alleges* tender.

contract' " and could not have recovered greater relief than the defendant. (*Id*. at p. 608.) Indeed, the plaintiff did not challenge the factual finding that the defendant had paid the contractual debt in full. (*Ibid*.) The court further justified its prevailing party conclusion with section 1717(b)(2), observing the defendant had alleged not only a tender but the plaintiff's actual collection of the entire debt, leaving nothing to be deposited. The court said, "[A]lthough subdivision (b)(2) of section 1717 does not precisely fit the facts of this case (which involve actual collection of the contractual debt rather than tender and deposit), the logic of the statute requires that [defendant] be deemed the prevailing party." (*Ibid*.) Further, in distinguishing authority relied on by the plaintiff, *Karton* emphasized that it mattered under section 1717(b)(2) that the "contractual debt was 'paid before [the] answer [was] filed . . . .' " (*Id*. at p. 609.) *Karton*, which involved a situation akin to an accord and satisfaction, squarely held the defendant prevailed under section 1717's general definition in subdivision (b)(1), leaving its discussion of the tender and deposit requirements of subdivision (b)(2) dictum. To the extent we consider *Karton*, it acknowledges a defendant must make its tender early, pre-answer, in line with our holding. *Karton* does not convince us to reach a different conclusion.

Section 1717(b)(2) operates to make the defendant the prevailing party when the defendant's allegation of tender is "found to be true." The trial court here did not find Milgard's allegation of tender to be true, correctly ruling there was "no evidence that [Milgard] actually tendered the amount to D.R. Horton before [Milgard] deposited [it] with the court." For the reasons stated above, its finding and ruling is correct regardless of its actual rationale. (*Muro v. Cornerstone Staffing Solutions, Inc.* (2018) 20

Cal.App.5th 784, 790 [if a judgment is correct on any theory, the appellate court will affirm it regardless of the trial court's reasoning]; *People v. Nelson* (2012) 209 Cal.App.4th 698, 710 [same].)

B. *The Trial Court Did Not Abuse its Discretion by Ruling Milgard's Tender was Not the Full Amount to Which D.R. Horton was Entitled Under the Subcontracts and Declining To Treat Milgard's Offer as a Statutory Offer to Compromise*

Milgard sought to be declared the prevailing party in view of the trial court's determination—following a bench trial on the issue—that it was contractually obligated to pay D.R. Horton $11,100, an amount substantially less than the $45,000 it deposited. It argued the result was warranted "because D.R. Horton failed to obtain more in contract damages than Milgard tendered pursuant to . . . section 1717(b)(2)." (Capitalization omitted.) Milgard's appellate arguments similarly urge that "section 1717(b)(2) must be interpreted to require that, when, as was the case here, a plaintiff refuses to accept a tender of the full amount owed under the contract and continues to prosecute excessive damages claims, a defendant may amend its pleading to assert a section 1717(b)(2) defense and then tender the amount owed by depositing it with the court. Then, should the plaintiff persist in refusing the tender, the plaintiff proceeds to trial at its peril, risking the possibility that the defendant will be deemed the prevailing party under section 1717(b)(2) *if the plaintiff were to fail to recover more than the tender at trial*." (Italics added.) These arguments would have had the trial court treat the tender and deposit requirement akin to a statutory offer to compromise under Code of Civil Procedure section 998.

But section 1717(b)(2)'s tender and deposit mechanism for determining whether the defendant has prevailed is not dependent on the fact that the defendant is later found liable for a sum less than its tender. For the defendant to prevail under section 1717(b)(2), the court must find true the allegation that the amount it tendered and deposited was "the full amount to which [D.R. Horton] was entitled" under their subcontracts. (§ 1717(b)(2).) The prevailing party determination under section 1717(b)(2) for a tender and deposit turns not on the actual outcome of the litigation, but on a defendant's effort to avoid litigation entirely by attempting to pay the plaintiff in full under the contract at issue. Thus, in order to find the allegation to be true, the court must determine whether the defendant sought to pay the amount owed under the contract, not whether the ultimate judgment was greater or lesser than the amount offered.

In this way, a tender within the meaning of section 1717(b)(2) is not equivalent to a Code of Civil Procedure section 998 statutory offer to compromise.[8] This court and others have so held in connection with the tender and deposit provisions in other statutes. (See, e.g., *Tun v. Wells Fargo Dealer Services, Inc.*, *supra*, 5 Cal.App.5th at pp. 320, fn. 3, 325 [section 2983.4 tender "is not a statutory offer to compromise"]; *Hart v. Autowest Dodge*, *supra*, 147 Cal.App.4th at p. 1262 [defendant conflated section 2988.9 tender

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8 The statutory offer to compromise allows a defendant to make a written offer that judgment be entered against it for a specified amount. (Code Civ. Proc., § 998, subd. (b).) If the plaintiff does not accept it within a certain time, the offer is deemed withdrawn, and the plaintiff who fails to obtain a more favorable judgment relinquishes his or her postoffer costs and must pay the defendant's costs from the time of the offer. (Code Civ. Proc., § 998, subds. (b)(2), (c)(1); *Hoffman v. Superior Ready Mix Concrete, L.P.*, *supra*, 30 Cal.App.5th at p. 491.)

with an offer to compromise under Code of Civil Procedure section 998].) A statutory offer to compromise is designed to encourage settlement of litigation. (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1019; *Hoffman v. Superior Ready Mix Concrete, L.P.* (2018) 30 Cal.App.5th 474, 491 [Code of Civil Procedure section 998 is a cost-shifting statute that " 'encourages the settlement of actions, by penalizing parties who fail to accept reasonable pretrial settlement offers' "]; *Huerta v. Kava Holdings, Inc.* (2018) 29 Cal.App.5th 74, 79; *Melendrez v. Ameron Internat. Corp.* (2015) 240 Cal.App.4th 632, 647.) Unlike a section 1717(b)(2) tender, it may be made during the pendency of the action but before trial. (Code Civ. Proc., § 998, subd. (b) ["[n]ot less than 10 days prior to commencement of trial"]), and it does not require an unconditional tender and deposit of the entire amount owed.

Even if we were to reach a different conclusion about the timing and nature of Milgard's purported tender, we would conclude the trial court did not abuse its discretion by ruling Milgard did not tender "the full amount to which [D.R. Horton] was entitled . . . ." The nature of the dispute here centered on Milgard's obligation under subcontracts to provide indemnity and a defense to D.R. Horton for claims falling within the scope of its work. The trial court observed that the amount of D.R. Horton's defense fees and costs attributable to Milgard's work was a disputed and unliquidated sum that was not resolved until trial, and found that in depositing the $45,000, Milgard had guessed about how much of D.R. Horton's fees and costs should be allocated to it. The court's finding in effect was that Milgard did not tender "the full amount to which [D.R. Horton] was entitled under their subcontracts," and it correctly rejected Milgard's request

that in declaring who was the prevailing party under section 1717(b)(2)'s tender and deposit clause, it conduct a post hoc analysis of D.R. Horton's success in relation to Milgard's deposit. The court recognized that Milgard was conflating the tender and deposit mechanism with a statutory offer to compromise, and properly declined to treat Milgard's offer as one under Code of Civil Procedure section 998. Under the circumstances, we cannot say the court's finding concerning the truth of Milgard's allegation was either unsupported by the record, or a clear abuse of discretion.

Having upheld the court's ruling on the foregoing grounds, we need not decide more generally whether disputes involving unliquidated amount of damages, as here, are even amenable to the tender and deposit procedure. We leave such questions for another day.

IV. *The Legislative Purpose Behind the Tender and Deposit in Section 1717(b)(2) Is Consistent with This Outcome*

The evident legislative purpose in including the tender and deposit provision confirms our result. The author felt the need to give defendants in contract cases an opportunity to be declared a prevailing party, and avoid paying the plaintiff's attorney fees, where they endeavored early on to pay the full amount the plaintiff was entitled to recover on the contract, akin to virtually identical provisions in other consumer protection laws involving creditors and debtors. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1028 (1981-1982 Reg. Sess.), as introduced, p. 3, see footnote, *ante*.) By requiring a formal legal tender, the Legislature plainly sought to "discourage the maintenance of pointless litigation." (*CDF Firefighters v. Maldonado* (2011) 200 Cal.App.4th 158, 164.)

The tender and deposit language initially proposed in the bill did not change throughout its various amendments.

Milgard argues the legislative history indicates the Legislature sought to permit a tender to be made *after* the commencement of litigation so a defendant could avoid the penalty of prevailing party attorney fees by tendering the amount owed before trial and alleging the tender in an amended answer. It references an Assembly Judiciary Committee staff comment that the bill's proponent, the California Association of Realtors, stated that the tender offer provision was " 'designed to prevent an unscrupulous creditor from making excessive demands to incorporate the leverage of sustaining attorneys' fees in order to achieve a settlement in an amount in excess of that which is owed.' " (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 1028 (1981-1982 Reg. Sess.) p. 2.) It also points to several portions of the bill analyses where the writer states the aim of the provision is "encouraging settlements." According to Milgard, the provision was enacted as a " 'cost-shifting statute' akin to a 'statutory offer to compromise.' "

To be sure, one of the Legislature's express purposes in adding the tender and deposit clause of section 1717(b)(2) was to "encourag[e] settlements." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1028 (1981-1982 Reg. Sess.), as introduced, p. 3.) But when the Legislature referenced a broad policy purpose to promote settlement, we cannot conclude it meant to refer to settlement of pending litigation as opposed to settlement and resolution of a contractual dispute so as to somehow alter the settled legal definition of a tender, or that it intended to permit a tender under the statute to be made at any time during the pendency of litigation. Notably, the Legislature in 1981 added not

just the tender and deposit clause in subdivision (b)(2), but also the voluntary dismissal exception to a prevailing party, which states: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement *of the case*, there shall be no prevailing party for purposes of this section." (Stats. 1981, ch. 888 § 1, italics added.) *That* clause of subdivision (b)(2), which has no temporal limitation for the referenced dismissal (*CDF Firefighters v. Maldonado*, *supra*, 200 Cal.App.4th at p. 164), expressly refers to settlement of litigation. We must conclude the Legislature knew how to refer to settlement of pending litigation when it wished, but did not do so when inserting the tender and deposit language. In such circumstances, we will not read into section 1717(b)(2)'s tender and deposit language it does not contain or elements that do not appear on its face. (Accord, *Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277, 1295; *Lacagnina v. Comprehend Systems, Inc.* (2018) 25 Cal.App.5th 955, 970.)

Milgard further points out that the legislative history of subdivision (b)(2) of section 1717 shows that when faced with a proposal that the defendant's allegation be made in the "original answer," the Legislature declined to make that change in the statute. Milgard argues this establishes that the Legislature rejected any such limitation, intending a defendant may allege tender and deposit in an amended answer. But the timing of the *plea* is not dispositive to validity of a tender, and thus it is reasonable to conclude the Legislature understood that the law did not need to specify whether the plea may be made in an original or amended answer, warranting its decision to leave the long-standing statutory tender and deposit language alone.

Contrary to Milgard's suggestion, nothing in the legislative history provided by the parties indicates the Legislature intended the tender and deposit provision to operate as a cost-shifting mechanism like a statutory offer to compromise under Code of Civil Procedure section 998. Milgard points to the following comment in an Assembly Third Reading of the bill as amended on August 24, 1981: "The California Association of Realtors is sponsoring this bill because it feels it is needed to resolve an ambiguity arising from conflicting court of appeal opinions as to whether contractual attorney's fees are to be treated as costs or damages. According to the association, this classification is important in determining the manner of pleading, the applicability of cost-shifting statutes, and the adequacy of statutory offers of compromise." This does not refer to the tender and deposit mechanism, but the Legislature's decision to adopt case law characterizing contractual attorney fees as a cost of suit, so as " 'to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions and to eliminate distinctions based on whether recovery was authorized by statute or by contract.' " (*Walker v. Ticor Title Co. of California* (2012) 204 Cal.App.4th 363, 372, quoting *Santisas v. Goodin* (1998) 17 Cal.4th 599, 616.)[9] The comment evidences no intent to treat the tender and deposit provision like a statutory offer under Code of Civil Procedure section 998; they are different settlement mechanisms.

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9 "The amendment added the language, 'Reasonable attorney's fees shall be fixed by the court, . . . and shall be an element of the costs of suit.' (Stats.1981, ch. 888, § 1, p. 3399.) The sentence is retained in subdivision (a) of . . . section 1717." (*Walker v. Ticor Title Co. of California*, *supra*, 204 Cal.App.4th at p. 372, fn. 11.)

We are sensitive to the concerns raised by Milgard for defendants faced with what they believe are excessive contract claims by plaintiffs, and the need to discourage plaintiffs from using an attorney fee provision to try and extract sums from a defendant over and above their contract damages. A prelitigation tender of the amount due under the contract is intended to obviate the need for litigation in the first place, and force a plaintiff to seriously consider accepting such an offer or suffer the consequence of losing its right to attorney fees and costs if the court finds true the defendant's allegation of tender. After Milgard declined to accept D.R. Horton's request to provide a defense and litigation commenced, Milgard's remedy was to attempt a settlement or shift costs via an offer to have judgment entered against it under the statutory procedures of Civil Code section 998. According to Milgard, it made such an offer, and we express no opinion on the success or failure of its effort in that respect.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.